Supreme Court, U. S.
FILED
APR 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1498

RONNIE EARL DAVIS - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

RONNIE EARL DAVIS - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered in this case on October 1, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is reported at 545 S. W. 2d 644, and set forth in the Appendix, pp. 13-17, herein. The opinion and order denying Petition for Rehearing of the Kentucky Supreme Court are unreported and set forth in the Appendix, p. 18.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on October 1, 1976. Petition for rehearing was denied January 28, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a defendant's rights under the Fifth Amendment double jeopardy clause and under the Fourteenth Amendment due process clause are violated when, after being acquitted in one state court of the offense of detaining a woman against her will with intent to have carnal knowledge, he is later tried in another court of the same state for both the same detaining charge and also the greater offense of rape, along with an intermediate offense, carnal knowledge, and is convicted only of the latter offense but given the maximum sentence, where both trials involve the same prosecuting witness and encompass the same factual situation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States:

V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in

actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner, Ronnie Earl Davis, was convicted in Bullitt Circuit Court (Kentucky) of the offense of carnal knowledge of a female child under eighteen with her consent (KRS 435.100), and sentenced to the maximum ten (10) years imprisonment. He also was tried and acquitted under the same indictment of the offenses of rape (KRS 435.090) and detaining a woman against her will with intent to have carnal knowledge of her (KRS 435.110)[1] (Appendix, pp. 11, 19-23).

---

[1]All of these statutes have been superseded by the Kentucky Penal Code, effective January 1, 1975.

Previously, Petitioner had been indicted, tried and acquitted in Jefferson Circuit Court (Kentucky) on the same detaining charge. Both of the Petitioner's trials involved the same prosecuting witness and encompassed the same factual situation: on the night of February 15 and early morning of February 16, 1974, Petitioner had picked up the prosecuting witness, who was 16 years old at the time, in Jefferson County and driven to Bullitt County where they engaged in sexual intercourse. The prosecuting witness alleged at both trials that she had been abducted at gunpoint and compelled to engage in sexual intercourse. Petitioner maintained that he had met the prosecuting witness at a night club which restricted admissions to those over 21 years of age, and that the entire transaction had been completely consensual (see Appendix, pp. 13, 14).

Following his trial and acquittal in Jefferson Circuit Court, Petitioner moved to dismiss the charges against him in Bullitt Circuit Court on grounds of double jeopardy. After a hearing, this motion was denied. At Petitioner's trial in Bullitt Circuit Court, evidence relevant to the detaining and rape charges, but completely irrelevant and immaterial to the carnal knowledge charge, was introduced (i.e., abduction at gunpoint; intercourse by forcible compulsion). At the conclusion of all the evidence, Petitioner renewed his motion to dismiss, but it was again overruled. The jury, instructed on all three charges, returned a verdict convicting Petitioner of carnal knowledge, the intermediate offense, and sentenced him to the maximum ten years imprisonment (Appendix, pp. 11-14).

Petitioner appealed his conviction to the Supreme Court of Kentucky, alleging three constitutional errors: (1) that the Fifth Amendment double jeopardy clause, as applied to the States through the Fourteenth, prohibited his being twice tried for detaining; (2) that detaining was a lesser included offense within the greater offenses of carnal knowledge and rape, and therefore the Fifth Amendment also precluded his being tried for the latter charges; and (3) that, even if detaining was not a lesser included offense of carnal knowledge, he was denied due process and prejudiced by being unconstitutionally compelled to stand trial on the detaining and rape charges.

In affirming Petitioner's conviction, the Supreme Court of Kentucky, while acknowledging that detaining is included within the greater offense of rape, clarified Kentucky law by holding that detaining is not a lesser included offense of carnal knowledge. Despite the fact that Petitioner had been twice tried for the same offense (detaining) based upon the same facts, and had been tried at a second trial for a greater offense (rape) after having been acquitted of a lesser offense (detaining) at a prior trial, the Kentucky court stated that the error, if any, was not prejudicial. The Kentucky court failed to acknowledge the federal constitutional error in allowing Petitioner to be retried for the detaining charge and the greater offense of rape, while nevertheless observing that the same issues litigated in Jefferson Circuit Court were later relitigated in Bullitt Circuit Court. The Kentucky court concluded that any such error was not prejudicial be-

cause Petitioner had been convicted only of carnal knowledge and not of the offenses of detaining or rape (Appendix, pp. 14-16).

ARGUMENT

The Fifth Amendment Double Jeopardy Clause and the Fourteenth Amendment Due Process Clause Were Violated When, After an Acquittal in One State Court of the Offense of Detaining a Woman, the Defendant Was Later Tried in Another Court of the Same State for Both the Same Detaining Charge and Also the Greater Offense of Rape, Where Both Trials Involved the Same Prosecuting Witness and Encompassed the Same Factual Situation.

The ruling of the Supreme Court of Kentucky on the federal constitutional question presented herein is in direct conflict with applicable decisions of this Court.

The Supreme Court of Kentucky in its opinion below apparently adopts the view that one does not suffer double jeopardy unless he is convicted of an offense for which he had been tried previously. The Kentucky court analogized the case at bar to one in which:

> ". . . A defendant indicted for murder and convicted of manslaughter complains that the instruction on murder was not supported by sufficient evidence and should not have been given" (Appendix, p. 16).

Nevertheless, the case at bar is clearly distinguishable from the Kentucky court's example in that this

case involves not a mere erroneous instruction, but the denial of a right specifically granted under the United States Constitution. This Court has made it clear that the prohibition against double jeopardy is an absolute, unqualified right under the United States Constitution, and a fundamental principal of the Anglo-American concept of liberty and justice. *Benton* v. *Maryland,* 395 U. S. 784; *Green* v. *United States,* 355 U. S. 184.

As this Court has stated, the Fifth Amendment double jeopardy clause is cast in terms of potential risk or hazard of trial and conviction, and not of the ultimate legal consequences of the verdict. *Price* v. *Georgia,* 398 U. S. 3203; *Breed* v. *Jones,* 421 U. S. 519. It is quite apparent that a defendant's constitutional right not to be placed in double jeopardy is violated when he is tried a second time for an offense of which he has been acquitted previously, regardless of whether he is convicted of the offense at the second trial. *Benton, supra; Price, supra.* It is obvious that Petitioner's right under the Fifth Amendment not to be placed in double jeopardy was violated when, after being acquitted in Jefferson Circuit Court of the offense of detaining, he was later tried in Bullitt Circuit Court for the same detaining charge and also the greater offense of rape, both trials having been based upon the same factual situation.

Moreover, this Court has established a standard which requires that before an error involving the denial of a federal constitutional right in a state criminal court case can be held to be harmless, it must appear that the error was harmless beyond a reason-

able doubt. *Chapman* v. *California,* 386 U. S. 18; *Harrington* v. *California,* 395 U. S. 250. Correspondingly, such error is not harmless if it has resulted in a reasonable possibility of prejudice to the defendant. *Price, supra.*

Despite the fact that Petitioner was convicted of neither detaining nor rape, his federal constitutional right was violated by subjecting him to the potential risk of trial and conviction on these charges. *Price, supra; Breed, supra.* Not only did the Kentucky Court ignore this federal constitutional question, but it was also remiss in failing to employ the federal harmless error standard to ascertain whether Petitioner had been prejudiced by the infringement of his constitutional rights.

In deciding the question of prejudice, the Kentucky Court's attention should have focused on: (1) the proof necessary to sustain a conviction on carnal knowledge, and (2) the evidence actually adduced at trial relevant only to the unconstitutional charges of detaining and rape. Mindful that Kentucky juries not only determine issues of guilt or innocence, but set sentences as well, the Kentucky Court should also have considered whether and to what extent evidence relevant to the detaining and rape charges influenced the length of the sentence which Petitioner received.

In the case at bar, the Commonwealth introduced substantial evidence at trial which, while relevant as to the unconstitutional detaining and rape charges (i.e. abduction at gunpoint, forcible rape) was totally irrelevant and immaterial with regard to the charge of

carnal knowledge. A conviction for carnal knowledge under Kentucky law requires proof only of sexual intercourse and the victim's age. The extraneous evidence presented at Petitioner's trial could only have served to inflame the passions of the jury. In fact, the jury convicted Petitioner on the intermediate charge submitted (carnal knowledge), sentencing him to ten (10) years imprisonment—the maximum sentence for that offense. It is all too probable that the jury was induced to compromise on the carnal knowledge conviction and/or the resulting ten (10) years sentence on the basis of evidence introduced by the Commonwealth relevant only to the detaining and rape charges. *Price, supra; Benton, supra.*

Applying the federal harmless error standard to this case, then, for Petitioner's conviction to stand, it must appear beyond a reasonable doubt that his conviction and sentence was not prejudiced by the irrelevant and immaterial evidence admitted at trial. Petitioner respectfully submits that there was more than a reasonable possibility of prejudice to him, and refers this Court to the opinion of the Supreme Court of Kentucky, where it is stated:

> "We acknowledge that his acquittal of these charges does not necessarily mean they did not have a prejudicial effect on his defense against the charge on which he was found guilty" (Appendix, p. 16).

Thus, the Supreme Court of Kentucky itself acknowledged the existence of a reasonable possibility of prejudice to the Petitioner as a result of the viola-

tion of the double jeopardy clause which occurred herein. The Kentucky Court's upholding of Petitioner's conviction is, therefore, in direct conflict with the aforementioned applicable decisions of this Court, and is in derogation of the letter and spirit of the Fifth Amendment double jeopardy clause and Fourteenth Amendment due process clause. The many decisions of this Court vigorously protecting these Amendments will not permit them to be eroded in such a manner.

CONCLUSION

This Court has consistently held that the prohibition against double jeopardy is an absolute, unqualified right under the United States constitution, and a fundamental principal of the Anglo-American concept of liberty and justice. For it to continue to be so, this Court must, as it has in the past, continue to give meaning to the concept by vigilantly enforcing its provisions. This Court has such an opportunity here and now. For the foregoing reasons, a serious constitutional issue is involved herein. It is respectfully submitted, therefore, that this petition for writ of certiorari should be granted.

Respectfully submitted,

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MICHAEL J. KOPEN
440 South Seventh Street
Louisville, Kentucky 40203

Attorneys for Petitioner

APPENDIX

BULLITT CIRCUIT COURT

#4133—KRS 435.110 Carnal Knowledge

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

v.

RONNIE EARL DAVIS - - - - - - - *Defendant*

FINAL JUDGMENT—SENTENCE OF IMPRISONMENT

(Rule Day April 25, 1975)

The defendant, Ronnie Earl Davis, having entered a plea of not guilty, and on the 21st day of March 1975, a jury having returned a verdict that the defendant was guilty of the crime of carnal knowledge of a female, Holly Payne, and fixed his sentence at ten (10) years.

On this 25th day of April, 1975, the defendant Ronnie Earl Davis, appeared in open court with his attorney, Hon. Edward C. Airhart, and the Court inquired of the defendant and his counsel whether they had any legal cause why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court having given due consideration to the written report of the presentence investigation prepared by the Division of Probation and Parole, and to the nature of the circumstances of the crime, and the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary for protection of the public.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant, and it is therefore ORDERED AND ADJUDGED by the Court that the defendant is guilty of the crime of having carnal knowledge of a female, and that he shall be confined in the State Penitentiary for a minimum term of TEN (10) years; and it is further ORDERED AND ADJUDGED that the Bullitt County Sheriff shall deliver the defendant to the custody of the Department of Corrections hereunder at such location within this state as the Department shall designate.

It is further ORDERED AND ADJUDGED that the defendant is hereby credited with the time spent in custody prior to the Commencement of sentence, towards service of the maximum term of imprisonment.

After imposing sentence, the Court informed the defendant that he had a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him, that an appeal must be taken within ten (10) days of the date of this judgment and that the clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so requests. Pending appeal the defendant is permitted to execute a bond in the sum of $10,000.00. Whereupon the defendant executed bond.

/s/ C. V. SANDERS
Judge, Bullitt Circuit Court
Date: 7-29-75

SUPREME COURT OF KENTUCKY

RENDERED: OCTOBER 1, 1976

75-1157

RONNIE EARL DAVIS - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - *Appellee*

Appeal from Bullitt Circuit Court
Hon. C. V. Sanders, Judge
Indictment No. 41133

OPINION OF THE COURT BY JUSTICE PALMORE—AFFIRMING

On the late evening and night of February 15-16, 1974, Ronnie Earl Davis, the appellant, picked up a 16-year-old girl in Jefferson County and transported her into Bullitt County, where they had sexual intercourse. She claims that she was abducted against her will and was raped. He claims that she went with him willingly and consented to the intercourse.

Davis was indicted in Jefferson County for detaining a woman against her will (KRS 435.110) and for armed robbery (KRS 433.140), and was indicted in Bullitt County for rape (KRS 435.090), carnal knowledge, KRS 435.100 (c),

and detaining a woman against her will (KRS 435.110).[1] He was first tried on the Jefferson County charges and was acquitted. He was then tried on the Bullitt County charges and was convicted only of carnal knowledge, for which he was sentenced to 10 years' imprisonment (the maximum penalty for that offense). He appeals the Bullitt County conviction, claiming among other things double jeopardy.

The double jeopardy point is based on the theory that the offenses of carnal knowledge and detaining a woman against her will are both lesser included offenses within the offense of forcible rape, hence an acquittal on any one must be an acquittal on all.

It is true that each of these two lesser offenses is included within the greater offense of forcible rape. Fenston v. Commonwealth, 82 Ky. 549 (1885), so held with respect to carnal knowledge, and Meade v. Commonwealth, 214 Ky. 88, 282 S. W. 781 (1926), so held with respect to detaining a woman against her will. Nevertheless, though each is embraced within forcible rape, neither of these two lesser offenses is embraced within the other. As a matter of fact, they are mutually exclusive. Hence a trial on one of them alone does not expose the defendant to conviction of the other, or to conviction on any component of the other (as, for example, assault would be a degree of detaining).

Laying aside the possible argument that what may have begun with consent in Jefferson County could have culminated in something without consent in Bullitt County, or vice versa, let it be assumed that Davis' acquittal of the detaining charge in Jefferson County was a bar to the detaining and forcible rape charges in Bullitt County. He was acquitted of them anyway, leaving for consideration

[1]All of these statutes have been superseded by the Kentucky Penal Code, effective Jan. 1, 1975.

only the question of whether the Jefferson County prosecution and acquittal were a bar also to his trial in Bullitt County on the charge of carnal knowledge.

Force is a necessary element of common-law rape. So is the act of intercourse. Hence in the course of consummating a forcible rape one must necessarily (1) assault and detain a woman against her will and (2) have carnal knowledge of her. Conversely, force is not a necessary element of carnal knowledge. A trial on the charge of detaining a woman against her will does not involve any element necessary to conviction of carnal knowledge. Therefore, it is our opinion that even though the evidence at the two trials may have been the same, the first trial on the charge of detaining the girl against her will was not a bar to the subsequent trial on the charge of having simple intercourse with her. The cases holding that a trial on any degree of a crime bars a conviction on any other degree are not applicable.

The linchpin of the appellant's argument on the jeopardy proposition is that Meade v. Commonwealth, 214 Ky. 88, 282 S. W. 781 (1926), held detaining a woman against her will to be a lesser degree of carnal knowledge. We do not so construe the *Meade* case. The defendant had been indicted for attempted rape, and his conviction was reversed on the grounds that he was entitled to instructions on simple assault and detaining a woman against her will, both of which offenses were held to be included within attempted rape. The opinion has a peculiar twist, however, in its treatment of the court's earlier opinion in Head v. Commonwealth, 174 Ky. 841, 192 S. W. 861 (1917), written by the same author. The *Head* opinion correctly held that detaining a woman against her will was not a lesser degree of carnal knowledge, but in so doing relied on Lowry v. Commonwealth, 119 Ky. 691, 63 S. W. 977, 23 R 1240 (1901), which had held (incorrectly) that detaining a woman against her will was not a degree of forcible rape. In overruling

Lowry, Meade also damns *Head,* but its thrust was directed at *Head's* reliance upon *Lowry,* as clearly indicated by the following passage in *Meade* (emphasis added):

"We therefore see no escape from the conclusion that we were in error when we held in the Lowry case and the Head case and the others following and based upon it, that the statutory offense of detaining a woman against her will was not a degree of *the common-law one of rape,* and those cases are hereby overruled," etc. 282 S. W. at p. 785.

Thus it is not necessary to overrule *Meade* in order to reach the result upon which we have decided in this case. We do not perceive that the issue, or any issue, tried in Jefferson County was relitigated under the carnal knowledge issue in Bullitt County. They were relitigated under the rape charge, and probably under the detaining charge as well, but as heretofore mentioned, the latter two charges resulted in acquittals.

It is further contended that even if it be held that his trial on the charge of carnal knowledge did not subject Davis to double jeopardy, he was nonetheless unfairly prejudiced and denied due process of law in violation of the federal Constitution by reason of being simultaneously tried on the rape and detaining charges. We acknowledge that his acquittal of these charges does not necessarily mean they did not have a prejudicial effect on his defense against the charge on which he was found guilty. However, the situation is much the same as when a defendant indicted for murder and convicted of manslaughter complains that the instruction on murder was not supported by sufficient evidence and should not have been given. In such instances it has been uniformly held by this court that the error, if any, was not prejudicial. See cases collected in West's Kentucky Digest, *Homicide,* Key No. 340 (4).

The judgment is affirmed.

All concur.

Attorneys for Appellant:

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COMMONWEALTH OF KENTUCKY
(Seal)

OPINION RENDERED OCTOBER 1, 1976

Supreme Court of Kentucky

File No. 75-1157

RONNIE EARL DAVIS

v.

COMMONWEALTH OF KENTUCKY

Appeal from Bullitt Circuit Court
Action No. Ind. #4133

MANDATE

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

January 28, 1977 Appellant's Petition for Rehearing Denied.

A Copy—Attest: (Seal)

/s/ Martha Layne Collins
Clerk

Issued January 28, 1977

THE COMMONWEALTH OF KENTUCKY
Bullitt Circuit Court
March Term, 1974
Indictment No. 4133
KRS 435.090 435.100 435.110

COMMONWEALTH OF KENTUCKY

v.

RONNIE EARL DAVIS - - - - - - *Defendant*

THE GRAND JURY CHARGES:

COUNT 1.

On or about 16th day of February, 1974, in Bullitt County, Kentucky, the above named defendant raped one, Holly Payne, a female over 12,

COUNT 2.

On or about 16th day of February, 1974, in Bullitt County, Kentucky, the above named defendant carnally knew, a female under 18,

COUNT 3.

On or about 16th day of February 1974, in Bullitt County, Kentucky, the above named defendant detained a woman, one Holly Payne, against her will with intent to have carnal knowledge of her,
against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL
/s/ STANLEY CRENSHAW
Foreman

WITNESSES:

Holly Payne (address 3000 Wurtele, Louisville, Ky.)

Ken Rigdon K.S.P.
Det. Browder L.P.D.

Larry Embry (Address: 428 N. Hite, Apt. 1, Louisville, Kentucky)

Dr. Birley (Gen. Hospital)
David Butler K.S.P.

Presented by the Foreman in the presence of the grand jury to the Court in open Court this the 18 day of March, 1974

/s/ NANCY STRANGE
Clerk Bullitt Circuit Court.

THE COMMONWEALTH OF KENTUCKY
Jefferson Circuit Court, Criminal Division
151551
April Term A. D., 1974

THE COMMONWEALTH OF KENTUCKY

Against

RONNIE EARL DAVIS

ARMED ROBBERY
433.140 Not less than 10 Years OR Life ~~OR Death~~

DETAINING A FEMALE
435.110 2 to 7

(Filed February 17, 1975)

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 16th day of February 1974, in Jefferson County, Kentucky, the above named defendant robbed Larry W. Embry, 428 No. Hite Avenue, and in so doing, used or displayed a deadly weapon, a pistol.

COUNT TWO

That on or about the 15th day of February 1974, in Jefferson County, Kentucky, the above named defendant

detained a female, one Holly Payne, 3000 Wurtele Avenue, against her will, with intent to have carnal knowledge of her.

Both against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL
/s/ LARRY LAYNE
Foreman

A Copy
Attest: PAULIE MILLER, *Clerk*
Jefferson Circuit Court
Louisville, Kentucky

By /s/ M. SANDERS D.C.

Wit: *Larry W. Embry,* 428 No. Hite, #1
Holly Payne, 3000 Wurtele Ave.

Offs: *Sgt. Browder;* J. Laufer; H. Case;
J. Hikes; J. Sherrard; V. Keisker, LPD
Sgt. Butler; Tpr. K. Rigdon, KSP.—Elizabethtown

JEFFERSON CIRCUIT COURT

COMMONWEALTH OF KENTUCKY, COUNTY OF JEFFERSON
CRIMINAL BRANCH, SECOND DIVISION

No. 151551

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RONNIE EARL DAVIS - - - - - *Defendant*

(ARMED ROBBERY, DETAINING A FEMALE.)

JUDGMENT—Filed Feb. 17, 1975

AT A COURT HELD NOVEMBER 12, 1974.

This day, the defendant was brought into Court by the Sheriff. Comes his attorney Mr. Airhart. Both sides agree the jury is present. All of the evidence being heard and argument of counsel heard and instructions of the Court given, the jury retired and returned into open Court and reported the following verdict, to-wit: We, the jury, find the defendant, Ronnie Earl Davis, Not Guilty under Instruction No. 1., Signed Henry R. Heinemann, We, the jury, find the defendant, Ronnie Earl Davis, not Guilty under Instruction No. 2, Signed Henry R. Heinemann, Foreman. It is ordered by the Court that the defendant be and is remanded to jail and released as to this case only.

/s/ JOHN P. HAYES
Judge

A Copy
Attest: PAULIE MILLER, *Clerk*
Jefferson Circuit Court
Louisville, Kentucky

By /s/ M. SANDERS D.C.

BULLITT CIRCUIT COURT

Indictment No. 4133

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RONNIE EARL DAVIS - - - - - *Defendant*

MOTION TO DISMISS—Filed Feb. 17, 1975

Comes the Defendant, Ronnie Earl Davis, by counsel, moves the Court to dismiss all charges in the Bullitt Circuit Court, Indictment Number 4133, styled Commonwealth of Kentucky vs. Ronnie Earl Davis.

/s/ EDWARD C. AIRHART
440 South Seventh Street
Louisville, Kentucky 40203
587-0789

Attorney for Defendant

This is to certify that a copy of the foregoing was hand delivered to the Commonwealth's Attorney this 17th day of February, 1975.

/s/ EDWARD C. AIRHART

BULLITT CIRCUIT COURT

Indictment No. 4133

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RONNIE EARL DAVIS - - - - - *Defendant*

AFFIDAVIT—Filed Feb. 17, 1975

Comes the Affiant, Edward C. Airhart, and after being duly sworn, states as follows:

1. That he is the attorney for the Defendant, Ronnie Earl Davis.

2. That on or about May 1, 1974 the Defendant, Ronnie Earl Davis was indicted by the Jefferson Circuit Court, Criminal Division, Action No. 151551 and charged with armed robbery and detaining a female against her will pursuant to KRS 435.110. A certified copy of the aforesaid indictment is attached hereto as though fully copied herein.

3. That on November 11 and 12, 1974 the Defendant, Ronnie Earl Davis was tried by jury in the aforesaid action and was found not guilty on both counts. A certified copy of the Judgment is attached hereto as though fully copied herein.

4. Count No. 2 in Jefferson Circuit Court, Action No. 151551 charged the Defendant, Ronnie Earl Davis with detaining a female, one Holly Payne, on or about February 16, 1974. Further, Count No. 3 of the Bullitt Circuit Court, Action No. 4133 charges the Defendant, Ronnie Earl Davis

with detaining a female, one Holly Payne on or about February 16, 1974.

5. Based on the acquittal of the Jefferson Circuit Court Action No. 151551 the Commonwealth of Kentucky is prohibited from putting the Defendant in jeopardy twice for the same offense pursuant to the Kentucky Constitution, Section 13, and the 5th and 14th Amendment of the United States Constitution.

6. Further since Count No. 1 in Bullitt Circuit Court, Action No. 4133 is a greater offense of Action No. 3 and Count 2 in Bullitt Circuit Court, Action No. 4133 is a lesser offense of Count No. 1 in the same action, the Commonwealth of Kentucky is prohibited from prosecuting the Defendant, Ronnie Earl Davis for these actions since the Commonwealth cannot prosecute the Defendant, Ronnie Earl Davis for a greater offense after an acquittal of the lesser offense.

Further, Affiant sayeth not.

/s/ EDWARD C. AIRHART

Subscribed and sworn to before me by Edward C. Airhart this 14th day of February, 1975.

My commission expires: 12/20/78

/s/ YVONNE M. BROOKS
Notary Public, State at Large, Kentucky

This is to certify that a copy of
the foregoing was hand delivered
to the Commonwealth's Attorney
this 17th day of February, 1975.

/s/ EDWARD C. AIRHART

BULLITT CIRCUIT COURT

Indictment #4133

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RONNIE EARL DAVIS - - - - - *Defendant*

TRANSCRIPT OF MOTION TO DISMISS INDICTMENT

This cause came on for hearing in the Bullitt Circuit Court, on the 17th day of February 1975, before the Honorable C. V. Sanders, Presiding Judge of the 55th Judicial District of Kentucky, upon Motion on behalf of Defendant to dismiss indictment.

The Commonwealth was represented by its attorney, Honorable Thomas L. Waller, Shepherdsville, Kentucky.

Defendant was represented by his attorney, Honorable Edward C. Airhart, 440 South Seventh Street, Louisville, Kentucky.

Upon convening of Court, the following was heard:

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Mr. Airhart: In Kitchen vs. the Commonwealth, 122 S. W. 2d 121, the Court held there that the offense of detaining a female against her will was a lesser degree of rape. That case is directly on point. It says detaining a female is a lesser offense of rape and in Burnett vs. Commonwealth the Court stated that where a person is charged or tried for the lesser offense and acquitted or convicted, he cannot be subsequently charged with the greater offense.

The Court: Growing out of the same act? Again that goes to a different point, different issue.

Mr. Airhart: I can understand the Court's concern in saying these are different acts but it's what the charges were and the charges were detaining a female against her will in Jefferson and detaining her here in Bullitt, both being the same offense, that is detaining Holly Payne against her will and it was the charge that makes all of these others, or puts all these other charges in the situation where they must be dismissed. It is not the act itself but by charging him with both these crimes, even though the Commonwealth may now contend she was not detained in Jefferson County against her will, nevertheless, he was charged with that crime in Jefferson and since he was acquitted of that crime in Jefferson County, he can't later be charged here with detaining.

The Court: I guess that's where I can't follow you exactly. If you're saying . . .

Mr. Airhart: If I was guilty or did the assault and battery where I hit a person and we fought and came across the county line . . .

The Court: You fell across the line from Jefferson to Bullitt?

Mr. Airhart: Right, I would have committed one act and that is the act of assault and battery and if I was acquitted in Jefferson County, subsequently I would be placed in double jeopardy if I was charged with the same offense here.

The Court: Yes, it would be the same act even though there was a period of time. You're saying the detention was one act?

Mr. Airhart: Right, that continued over into another county.

The Court: Even though he had taken her all the way

around Kentucky into the whole 120 counties before he brought her back to Jefferson County?

Mr. Airhart: Yes, even though there was a time lag in all of them.

The Court: While he's charged with carrying her around as this fellow did, raped or assaulted her, it would seem to me that he could be charged with those assaults or rapes in whatever county they were committed in.

Mr. Airhart: I agree with you entirely. I think the Court does have jurisdiction but I think that if the Commonwealth chooses to prosecute him in another county for any of these acts without giving the county that the greater offense was in, first right to prosecute, then I think that county is barred from prosecuting.

The Court: If those offenses are offenses that are growing out of the same transaction, I think it has to be the same act and I think your argument is sound but I can't believe the law could bar prosecution in the different counties, even though he had been tried in another county where there was a different act, this is a different charge and different time and place.

Mr. Airhart: If the Court will please refer to Braswell vs. Commonwealth, the Court held in that case that to sustain a plea of former jeopardy, the burden is on the accused to show the charge previously tried is the same charge or some degree of it now being tried. Evidence heard on the former charge was substantially the same and the same act was involved upon each trial. Here you have the same degree of the same crime, that is rape, detaining. So you have the same charge, same act or some degree of it.

Mr. Waller: I think the problem with that argument, as Mr. Porter indicated, is that the original detention in Jefferson County was stemming out of the robbery and that even though the indictment in Jefferson County also alleged a detention of Holly Payne with the intention to have carnal

knowledge of her, if, as Mr. Porter said, he used this woman in effort to make an escape after he was apparently discovered there at the scene of the crime, that by using her as a hostage in order to escape, then leaving the scene and coming into Bullitt County and deciding at that time and that place to commit the crime of rape, that in effect what we have is an entirely different crime.

The Court: Yes. I can't believe your statements of these authorities and your reference to them would justify going as far as your argument would take us in this case, in view of the different crimes, I don't believe your authorities at this time lead inescapably to the conclusion that another charge in the indictment could not have been made in Jefferson County. Of course, it could conceivably be he could have been charged on one or more of those charges at one time and others at another time. * * * I don't think the Court here wants to get into the position of giving another swat to somebody that has been swatted at one time in Jefferson County. I think I'll follow the course of overruling your motion.

EXCERPT FROM TRANSCRIPT OF EVIDENCE
(at page 49)

At the Conclusion of all the evidence, the following was heard in chambers:

Mr. Waller: Just for the record, I want to renew my motion to strike all testimony regarding the reputation of the prosecuting witness. There wasn't a single witness among those three girls that testified that they knew of their own knowledge what this girl's reputation for moral behavior or sexual behavior was in the community, and what everyone of those witness said was what somebody else told them.

The Court: For the sake of argument, that's really what reputation is. I'll overrule your motion.

Mr. Airhart: On behalf of the defendant, I again move for a dismissal of this indictment for the reasons hereinbefore stated.

The Court: Considering said motion, overruled same.